

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WESLEY JACKSON CHOATE, JR.**

Claimant

VS.

**KOCH-GLITSCH, L.P.**

Self-Insured Respondent

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Docket No. 1,008,961

**ORDER**

Claimant appealed the August 3, 2004 Order entered by Special Administrative Law Judge Vincent L. Bogart.

**ISSUES**

Claimant alleges he injured his back on January 22, 2003, working for respondent and that he now needs back surgery. In the August 3, 2004 preliminary hearing Order, Judge Bogart denied claimant's request for additional medical treatment and temporary total disability benefits after finding claimant had reached maximum medical improvement from his work-related injury.

Claimant contends Judge Bogart erred. Claimant argues he presently needs back surgery that is directly related to his injury at work. Accordingly, claimant requests the Board to reverse the August 3, 2004 preliminary hearing Order and to find that claimant's present need for medical treatment arose out of and in the course of his employment with respondent.

Conversely, respondent contends claimant's ongoing symptoms and need for medical treatment are due to his preexisting back problems and that any injury claimant sustained while working for respondent has resolved. Respondent also argues the record fails to relate the temporary aggravation that claimant sustained while working for respondent to his present need for medical treatment. Accordingly, respondent requests the Board to deny claimant's request for additional medical benefits or temporary total disability benefits.

The only issue before the Board on this appeal is whether claimant's present need for medical treatment is related to his alleged accident at work.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board concludes the August 3, 2004 Order should be affirmed. The Board finds and concludes that claimant failed to prove it is more probably true than not that his present need for medical treatment is related to his alleged January 22, 2003 work-related injury.

Claimant began working for respondent in late October 2002. Claimant's job of "pulling dies" involved manually sliding heavy dies in and out of a press. Claimant alleges he injured his back on January 22, 2003, while performing his work duties.

Before going to work for respondent, claimant had preexisting back problems, including spondylolisthesis at L4-5. Also, claimant began receiving treatment from a chiropractor in September 2002, which included treatment for his neck, mid-back and low back.

Claimant began seeing Dr. John F. McMaster on January 23, 2003, who ordered physical therapy, studies, and provided work restrictions. Dr. Pedro A. Murati became claimant's authorized treating physician in June 2003. In a February 13, 2004 letter to claimant's attorney, Dr. Murati related the current surgical recommendations (fusion at L4-5 with laminectomy at L4) from Dr. Kris Lewonowski to claimant's January 22, 2003 injury.

In June 2003, claimant saw Dr. Paul S. Stein for an evaluation. Dr. Stein concluded in his June 10, 2003 report that claimant had a preexisting and symptomatic spinal condition that may or may not have been aggravated by work activity on January 22, 2003. Moreover, Dr. Stein noted that the pain drawings from claimant's chiropractor, Dr. Susan Jensen, did not reflect leg symptoms other than left leg weakness. In his June 10, 2003 report to respondent's attorney, Dr. Stein wrote, in part:

In summary, there was a preexisting and symptomatic spinal condition which may or may not have been aggravated, to some degree, by work activity on 1/22/03. That is a question for the legal system to ultimately decide. However, even if there was some contribution by activity on that day, from a medical viewpoint I believe that any need for care is much more related to the prior condition than to any such aggravation, since the condition was already symptomatic.<sup>1</sup>

In December 2003, claimant saw orthopedic surgeon Kris Lewonowski, M.D., who diagnosed isthmic L4-5 spondylolisthesis with EMG documented left L5 radiculopathy. Dr. Lewonowski recommended surgery in his December 23, 2003 office notes, stating, in part:

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<sup>1</sup> P.H. Trans. (July 29, 2004), Resp. Ex. 1 at 5.

This patient has a history of mild low back pain but no leg symptoms as far as pain is concerned prior to his January 22nd incident. I feel that he has a classic exacerbation of a preexisting condition but he has no prior history of radiculopathy but it is now documented. He has undergone three epidural injections and has failed conservative management. I would recommend surgery in the way of an L4 laminectomy with L4-L5 instrumentated posterolateral fusion and interbody fusion.<sup>2</sup>

Accordingly, Dr. Lewonowski concluded claimant exacerbated a preexisting condition.

Claimant saw Dr. Philip R. Mills for a court-ordered independent medical evaluation in March 2004. In his March 30, 2004 report regarding the January 2003 work-related incident, Dr. Mills opined claimant sustained a temporary aggravation of a preexisting problem and that claimant was at maximum medical improvement. After reviewing medical records the doctor received the day after evaluating claimant, Dr. Mills wrote in April 2004 that Dr. Stein's conclusions in his June 10, 2003 report mirrored Dr. Mills' own conclusions.

Dr. Mills concluded claimant should lift only with good body mechanics and avoid prolonged or repetitious forward flexion, and should not lift greater than 50 pounds. The doctor also concluded claimant displayed no radicular signs during his examination.

This is a difficult claim as claimant's back was symptomatic before the alleged January 22, 2003 accident. And it is made more difficult by claimant's failure to provide a true history to Dr. McMaster. Accordingly, claimant's testimony must be weighed with care.

In this instance, the Board is persuaded by Dr. Mills' opinions as the doctor was selected by Administrative Law Judge Jon L. Frobish to provide an independent and unbiased evaluation of claimant's back condition. Consequently, for purposes of this preliminary hearing, claimant has failed to prove his present need for medical treatment, including possible back surgery, is directly related to his alleged accident at work. Therefore, the August 3, 2004 Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>3</sup>

**WHEREFORE**, the Board affirms the August 3, 2004 Order.

**IT IS SO ORDERED.**

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<sup>2</sup> M.H. Trans. (Feb. 24, 2004), Cl. Ex. 2.

<sup>3</sup> K.S.A. 44-534a(a)(2).

Dated this \_\_\_\_ day of October 2004.

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent  
Vincent L. Bogart, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director